

JEFFREY A. MULLINS  
937.641.1725  
mullins@taftlaw.com

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## Filed via Digital Charge System

Gary Shinnars  
Executive Secretary  
National Labor Relations Board  
1015 Half Street SE  
Washington, DC 20570-0001

Re: CTS Construction, Inc. (Communications Workers of America Local 4322, AFL-CIO-CLC)(Cincinnati Blue Ash, Ohio) Case 09-RD-187368

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Dear Mr. Shinnars:

CTS Construction, Inc. requests review of the National Labor Relations Board ("NLRB" or "Board") Regional Director's decision to dismiss the decertification petition filed on November 1, 2016.<sup>1</sup> **Exhibit A: Decision to Dismiss.** The dismissal should be overturned and the petition processed.

### **I. STATEMENT OF FACTS**

#### ***A. CTS Construction's Business***

CTS Construction, Inc. (the "Company") is a full-service telecommunications installation company. It provides network and cabling services to customers throughout the Midwest and the East Coast. The Company employs approximately 150 highly trained employees that travel to customers' properties for installation. Though headquartered in Southwestern Ohio, the Company's workforce is highly mobile. Employees generally do not work at a set office location. Rather, the field is their office and they travel throughout the country.

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<sup>1</sup> Unless otherwise noted, all dates are in 2016.

*B. Collective Bargaining for a Successor Agreement*

Collective bargaining for the purpose of entering into a successor collective bargaining agreement between the Communication Workers of America (the "Union") and the Company began on February 10 and continued throughout the month. At the outset, both parties did not have many proposals to exchange so both expected that they could reach an agreement before the collective bargaining agreement expired on February 28. Ultimately, the parties could not reach an agreement by the expiration date.

*C. The Union's Unfair Labor Practice Charges*

On or about April 27, a decertification petition was filed. A week or so later, the Union filed several unfair labor practice charges about the bargaining process and alleged unlawful conduct related to the decertification petition, all of which the Company denied. The parties met on May 26 and resumed negotiations toward a successor contract. On June 2, the Company and Union discussed dates for collective bargaining. On June 6, the Union filed several additional unfair labor practice charges alleging that the Company failed and refused to bargain in good faith with the Union during a June 1 bargaining session and that the Company unlawfully participated in the decertification process by: 1) soliciting a decertification petition; 2) providing improper assistance to at least one employee with respect to the collection of signatures; and, 3) making promises of benefits to unit employees and, conversely, making threats to unit employees. The Company again denied the charges.

*D. The Settlement Agreement and Posting Period*

The parties settled the unfair labor practice charges and entered into a settlement agreement ("Settlement Agreement") dated September 15 and approved on September 23, which contains a non-admissions clause and a posting period of 60 days. **Exhibit B: Settlement Agreement.** The decertification petition was withdrawn. **Exhibit C: NLRB Approval of Request to Withdraw Decertification Petition.** The Company maintains that it did not violate the National Labor Relations Act ("Act") in any way, but as many times is the case, the Company agreed to settle the alleged unfair labor practice charges and continue bargaining. Inclusion of the non-admissions clause was an integral part of the Settlement Agreement for the Company.

On October 4, the Company posted the required notice. The Company also mailed the notice to employees' home addresses as well as posted it in its brick and mortar locations. The Company mailed and posted the notice because the nature of its business requires that the employees perform the majority of their work off-site. Many employees would not have occasion to be at the physical workplace to see the notice, so the Company took the extra step to ensure that all had access to the notice.



The Company was in full compliance with the Settlement Agreement thereafter. The Union certified that the Company was fully compliant for the month of October on October 25, 2016. **Exhibit D: Certification of Compliance.**

On November 1, and during the posting period, a Company employee, James Monahan ("Monahan") filed the pending decertification petition ("RD Petition"). There is no indication that Monahan was involved with the filing of the first decertification petition.

*E. The Parties Bargain to a Tentative Agreement*

As discussed above, the Company denied all of the Union's allegations. Throughout the summer and fall months, the Union has not filed any subsequent unfair labor practice charges and the decertification petition was withdrawn. The parties continued to bargain in good faith all throughout the summer through in person meetings, phone calls, and emails. They met in person on September 13, 14, and 21. On October 25, they met again and reached a tentative agreement. The Company representative sent to the Union the agreed upon proposals on October 28. On October 31, the Union responded that it agreed with the proposals. The Company understands that the Union is planning to hold a vote to ratify the agreement. The Company has not received notice of the results of a ratification vote and the Company does not know what the result was, if any.

**II. THE BOARD SHOULD PROCESS THE RD PETITION**

*A. Poole's Reasonable Time Test Applies*

In dismissing the RD Petition, the Regional Director cited to the *Truserv* case, although the Company believes that the Regional Director probably should have cited to the *Poole* case. To be clear, the only pertinent aspect of *Truserv* is its reference to the *Poole* holding, which the Regional Director points to in the dismissal. Beyond its references to *Poole*, *Truserv* is inapplicable to this case. Rather, the *Poole* case, sets forth the test that the Board should use in evaluating the pending RD Petition and supports the Company's position that the RD Petition should be processed. *Poole Foundry & Machine Co.* 95 NLRB 34, 35 (1951), *enfd.* 192 F.2d 740 (4th Cir. 1951).

*Truserv* applies to a narrow set of circumstances. In *Truserv*, the NLRB found that a decertification petition filed after an alleged unfair labor practice by the employer occurs, but prior to the settlement of those charges, should not be dismissed where the Board has not found (or the employer has not admitted) that the employer actually engaged in the alleged unlawful conduct. In so doing, the Board overturned its prior decision in *Douglas-Randall Inc.*, 320 NLRB 431 (1995) and reinstated its previously overruled decision in *Passavant Health Center*, 278 NLRB 483 (1986), which refused to treat a settlement agreement as an admission of wrongdoing and, accordingly, did not require the Board to dismiss a decertification petition filed in

between the conduct at issue and the settlement. The Board in *Truserv* concluded that, absent a finding of a violation of the Act or an admission by the employer of such a violation, there is "no basis for dismissing a petition based on a settlement of alleged but unproven unfair labor practices."

There are several reasons why the NLRB should not extend *Truserv* to this case.<sup>2</sup> This case's facts diverge from *Truserv*. The *Truserv* decertification petition was filed prior to the settlement agreement and closer in time to the alleged unfair labor practice. In this case, the RD Petition was filed after the settlement of the alleged unfair labor practice and well after the alleged unlawful conduct occurred, which more closely tracks the *Poole* case.<sup>3</sup> This difference in timing shows that the decertification petition in *Truserv* was arguably more likely to be tainted than the RD Petition here because it was filed sooner after the alleged unlawful conduct occurred.

In addition, the Board has not found and the Company has not admitted to an unfair labor practice in this case. According to *Truserv*, the Board would then have no basis to dismiss the RD Petition based on the settlement of the alleged but unproven unfair labor practices.

Unlike *Truserv*, the Company and the Union have not entered into a collective bargaining agreement. In *Truserv*, the parties bundled the settlement agreement (with the non-admission clause) of the unfair labor practice charge with the ratification of the collective bargaining agreement. This is significant. The *Truserv* employees would have had no recourse after the collective bargaining agreement went into effect because of the contract bar rule, which bars decertification petitions after the parties have entered into a successor collective bargaining agreement. In order to relieve the "chill" on the employees' Section 7 rights, the Board in *Truserv* permitted the otherwise properly filed decertification petition to be processed even after the parties had entered into a collective bargaining agreement.

There appears to be some internal tension between the *Truserv* case introduction and the case's holding. The *Truserv* case introduction says that a decertification petition may not be processed if the settlement of the unfair labor practice charge precedes the filing of the petition. This introductory statement does not capture the case's holding and the impact of applying this sweeping statement to the case before the Board is significant. *Truserv* holds that "[w]hen the parties reach a collective-bargaining agreement during bargaining pursuant to a settlement agreement, the contract will, of course, continue to serve as a bar to newly filed petitions under the Board's contract-bar rules."

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<sup>2</sup> For the remainder of this brief, the Company will cite to *Poole* because the Regional Director used *Poole*'s holding to substantiate his decision but cited to *Truserv*.

<sup>3</sup> Though, in *Poole* the employer violated the settlement agreement prior to the decertification petition and the Company here did not.



The Board in *Truserv* could not mean that every decertification petition may not be processed if the settlement of the unfair labor practice charge precedes the decertification petition because if it did, it would be overturning *Poole*. Nothing in *Truserv* indicates that its holding overturns *Poole*. *Truserv* distinguishes *Poole* from its facts pointing out, as we do here, that in *Poole* the decertification petition was filed three months after the settlement agreement and the Board held that when the parties enter into a settlement agreement requiring bargaining, the employer must honor the bargaining obligation therein for a reasonable period of time. *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951), *enfd.* 192 F.2d 740 (4th Cir. 1951), *cert. denied* 342 U.S. 954 (1952). If the Board were to extend *Truserv* to every scenario that the contract bar doctrine would otherwise not reach, then all decertification petitions filed after a settlement agreement would be dismissed. That result would be antithetical to the policy behind *Truserv*, which is to preserve employees' Section 7 rights to choose to affiliate or not affiliate with a union.

It would mean that if the parties entered into a settlement agreement with a non-admission clause and a decertification petition was filed thereafter, no matter how long the parties bargained over a new agreement, employees would never be able to file another decertification petition until the successor collective bargaining agreement expired. Put another way, if the parties take three years to negotiate a new contract, but because they entered into a settlement agreement with a non-admission clause, employees are not permitted to file a decertification petition for those three years and throughout the term of a three-year contract, it could be six years until the employees could exercise their right to disassociate.

*B. A Reasonable Period of Time Has Passed*

The *Poole* case holds that the employer must honor the terms of the settlement agreement for a reasonable period of time, but the reasonable period of time does not relate specifically to the terms of the settlement agreement, but rather looks to the totality of bargaining. There is no requirement that the RD Petition be stayed until the posting period or for instance until the notice compliance certifications are returned on their due date. *Poole* instead looks to 1) Whether the parties were bargaining for an initial agreement; 2) The complexity of the issues being negotiated and the parties' bargaining procedures; 3) The total amount of time elapsed since the commencement of bargaining and the number of bargaining sessions; 4) The amount of progress made in negotiations and how near the parties were to agreement; and 5) The presence or absence of a bargaining impasse.

In *Poole*, the decertification petition was filed less than three months after the parties entered into a settlement agreement. Importantly, the employer thereafter refused to bargain with the union in violation of the settlement agreement.<sup>4</sup> The Board held that when the parties enter into a settlement agreement requiring

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<sup>4</sup> Fact not in existence in the current case.



bargaining, the employer must honor the bargaining obligation therein for a reasonable period of time. *Poole Foundry & Machine Co.*, 95 NLRB 34 (1951), *enfd.* 192 F.2d 740 (4th Cir. 1951), *cert. denied* 342 U.S. 954 (1952). The Company agrees that the Board made the right decision in *Poole*. The Board was correct to dismiss the decertification petition because the company had violated the settlement agreement and there was not a reasonable "cooling off" period after that for the employees to file their decertification petition.

Conversely, here, all of the *Poole* factors lead toward a finding that a reasonable time has passed. The contract the parties are negotiating is a successor contract and not an initial contract that would require substantial bargaining. The issues negotiated are principally related to wages, which are not complex. The Company has complied fully with the Settlement Agreement and there has been no claim by the Union that the Company is in breach of any provision of the Settlement Agreement. Likewise, from June on, there has been no allegation that the Company has violated the Act in any way. To be sure, the Company denies any prior allegations that would otherwise taint a decertification petition. The parties bargained in good faith all summer and into the fall. There was never an admission by the Company that it violated the Act and there was no formal finding by the Board that an unfair labor practice occurred. Any alleged unfair labor practice occurred in the late spring, and since then, bargaining has continued in good faith. The best evidence of that good faith bargaining is that the parties have reached a tentative collective bargaining agreement.

C. *The Act's Purpose is to Provide Workers with the Freedom to Choose to be Represented or Not Represented*

The Act is a protectionist law. Its purpose is to provide employees with the opportunity to affiliate with a union to restore equality of bargaining power between employers and employees. The Act's purpose is not to bind employees to a union with whom they do not wish to associate. Employees' decision to join and be represented by a union is not a finite one. That is, once employees choose to be represented by a union, they are not locked into that decision forever.

The Act gives the employees the right to disassociate from a union that is no longer upholding the Act's protectionist ideals. For instance, employees may wish to disassociate when a union is not providing quality services to the employees, when employees feel an individualized negotiation with their employer would yield better wages, hours, and working conditions, and when the employer and the employee are on friendly and equal footing, among other scenarios. The Act provides a pathway to freedom from a union through a decertification petition, which provides a very limited time frame through which employees can exercise their right to disassociate.

The employees in this case believe that their Union is not providing them with the proper support to negotiate with their employer. Twice since the collective bargaining agreement expired, employees have filed to decertify the Union. The

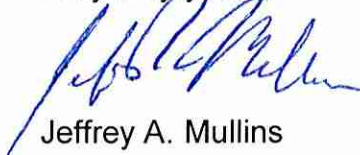
Regional Director dismissed the pending RD Petition without substantiation from governing Board law and without citation to the correct precedent. The parties are on the cusp of agreement. If they come to a final agreement, the contract bar rule would preclude employees from filing a third decertification petition. Meaning, they would have to wait years to assert their right to disassociate again. These employees have asked the Board to allow them the ability to vote to determine future representation by the Union. The Board has yet to provide them with a concrete explanation as to why it has denied them that right. If the Board believes that the alleged unfair labor practice remains fresh, then it should hold the RD Petition in abeyance until the end of the posting period, not dismiss it altogether.

D. *The Board Should Review the Totality of the Circumstances*

A reasonable time period has passed from any alleged unfair labor practice by the Company, the Company has complied with the Settlement Agreement, has continued to bargain in good faith with the Union and while there is no collective bargaining agreement in effect, the parties have reached a tentative agreement.

Using the settlement agreement or the posting period as a line to determine when the taint of some alleged but unproven prior unfair labor practice is extinguished would be arbitrary and does not comport with *Poole*. *Poole* requires the Board to look to the total bargaining history to determine if any taint from any alleged unlawful activity has poisoned a decertification petition. Here, the facts suggest that it has not. The alleged unfair labor practice occurred months prior to the pending RD Petition, the RD Petition was filed by a different employee than the first one, the Board never found a violation and the Company never admitted to one, bargaining has continued and in good faith to the point of a near ratification, the parties have met many times over nearly nine months to bargain, and the Company has complied completely with the terms of the Settlement Agreement. The Company did not instigate or solicit the RD Petition and finally did not include an agreement to withdraw a decertification petition in the settlement agreement. Accordingly, the Board should process the RD Petition or hold it in abeyance until the posting period concludes.

Very truly yours,



Jeffrey A. Mullins

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Enclosures

cc: Douglas C. Anspach Jr., Esq.  
Fred A. Ungerman Jr., Esq.



**CERTIFICATE OF SERVICE**

The undersigned hereby certifies that our Request for Review was filed electronically with the Office of the Executive Secretary on December 1, 2016. A copy of this filing was sent via regular mail or email to the following parties on December 1, 2016:

Dan Frazier, President, Communication Workers of America, AFL-CIO, (CWA), Local 4322, 5030 Linden Avenue, Dayton, OH 45432

Matthew R. Harris, District Counsel, Communications Workers of America, AFL-CIO, 20525 Center Ridge Road, Room 700, Cleveland, OH 44116

Rick Setzer, President, CTS Construction, Inc., 6661 Corporate Dr., Cincinnati, OH 45242 rsetzer@ctstelecomm.com

Bradley C. Smith, Flanagan Lieberman Hoffman & Swaim, 15 W. Fourth Street, Suite 100, Dayton, Ohio 45402 bsmith@flhslaw.com

/s/ Jeffrey A. Mullins  
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Jeffrey A. Mullins, Esq.  
Taft Stettinius & Hollister LLP  
40 North Main Street, Suite 1700  
Dayton, OH 45423-1029  
Ph: (937) 641-1725  
mullins@taftlaw.com